M-Concept Sdn Bhd v Berjaya Times Square Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S 3–24–473–2003
MOHD HISHAMUDIN J
6 MAY 2004

Contract — Time of the essence — Sale and purchase of property — Contract specified date of completion of commercial shop — Late completion — Whether purchaser could rescind sale and purchase agreement — s 56(1) of the Contracts Act 1950

Land law — Delivery of vacant possession — Late delivery of vacant possession —Whether defendant's failure constitutes fundamental breach of contractual obligation — Whether such breach entitles the plaintiff to rescind the contract

The plaintiff sought a declaration by way of originating summons to rescind a sale and purchase agreement dated 24 August 1995 ('the agreement'), entered into between the plaintiff as purchaser and the defendant as seller in respect of a property known as parcel No. 07-63, Commercial Shop Lot, Berjaya Star City ('the property'). The plaintiff relied its claim on the ground that the defendant had committed a fundamental breach of its contractual obligation to deliver vacant possession of the property on or before 23 November 1998 ('the stipulated date') as provided under clause 22(1) of the agreement. Even on 20 March 2003, the date when the plaintiff filed this originating summons, the defendant had still failed to deliver vacant possession of the property. The essential issue was whether the failure by the defendant to deliver vacant possession of the property on or before the stipulated date, or on or before any other date as promised by the defendant, constitutes a fundamental breach of the contract, which entitles the plaintiff to rescind the agreement.

Held, allowing the application:

(1) Considering the unreasonably long delay to deliver vacant possession, the answer to this question must be in the affirmative. The failure of the defendant to deliver vacant possession of the property after 23 November 1998, as agreed under clause 22(1) of the agreement, for nearly 4 years and 4 months until the present originating summons was filed, amounted to a fundamental breach of the agreement (see para 14).

(2) The delay was excessive and unreasonable given the fact that the defendant was required to deliver vacant possession of the property to the plaintiff within 36 months from the date of signing of the agreement. As under the agreement time was essential, the failure on the part of the defendant to deliver vacant possession at the stipulated time renders the agreement voidable at the plaintiff's option by virtue of s 56(1) of the Contracts Act 1950 (see para 14).

(3) It was unjust to estop the plaintiff from rescinding the agreement as plaintiff is the innocent party and all that it did in making the payments was to honour its obligations under the agreement. On the facts it cannot be said that there was no protest from the plaintiff over the

long delay. It must also be pointed out that the plaintiff was not happy in continuing making the payments but it had been induced in doing so by the defendant's officers through the latter's assurances on the completion date that eventually turned out to be nothing but empty promises as the property was never completed by the either the end of 2001 or the end of 2002 (see para 17).

(4) The defendant, by breaching the agreement has not come to Court with clean hands; and a party who has not come to Court with clean hands cannot pray in aid principles of equity such as the doctrine of estoppel (see para 17).

[**Bahasa Malaysia summary**

Plaintif telah memohon satu deklarasi melalui saman pemula untuk membatalkan perjanjian jual beli bertarikh 24 Ogos 1995 ('perjanjian tersebut'), di antara plaintif sebagai pembeli dan defendan sebagai penjual berkenaan dengan satu hartanah yang dikenali sebagai No parcel 07-063, Lot Kedai Komersial, Berjaya Star City ('hartanah tersebut'). Plaintif telah bergantung tuntutannya dengan alasan defendan telah melakukan perlanggaran utama tanggungjawab kontrak untuk menyerahkan milikan kosong hartanah tersebut pada atau sebelum 23 November 1998 ('tarikh yang ditetapkan') yang diperuntukkan di bawah klausa 22(1) perjanjian tersebut. Malahan pada 20 Mac 2003, iaitu pada tarikh plaintif memfailkan saman pemula, defendan masih lagi gagal untuk menyerahkan milikan kosong hartanah tersebut. Isu utama adalah sama ada kegagalan defendan untuk menyerahkan milikan kosong hartanah tersebut pada atau sebelum tarikh yang ditetapkan, atau pada atau sebelum tarikh lain yang dijanjikan oleh defendan, membentuk perlanggaran utama kontrak yang membolehkan plaintif untuk membatalkan perjanjian tersebut.

Diputuskan, membenarkan permohonan:

(1) Memandangkan kelewatan panjang yang tidak munasabah untuk menyerahkan milikan kosong, jawapan kepada soalan ini adalah afirmatif. Kegagalan defendan untuk menyerahkan milikan kosong hartanah tersebut selepas 23 November 1998, seperti yang dipersetujui di bawah klausa 22(1) perjanjian tersebut, setelah hampir 4 tahun 4 bulan sehingga saman pemula yang sekarang ini difailkan, membentuk satu perlanggaran utama perjanjian tersebut (lihat perenggan 14).

(2) Kelewatan itu adalah berlebihan dan tidak munasabah memandangkan defendan dikehendaki menyerahkan milikan kosong hartanah tersebut kepada plaintif dalam masa 36 bulan dari tarikh tandatangan perjanjian tersebut. Oleh kerana di dalam perjanjian tersebut, masa adalah mustahak, kegagalan defendan untuk menyerahkan milikan kosong pada masa yang diterapkan menjadikan perjanjian tersebut terbatal atas pilihan plaintif menurut s 56(1) Akta Kontrak 1950 (lihat perenggan 14).

(3) Adalah tidak adil untuk menghalang plaintif daripada membatalkan perjanjian tersebut kerana plaintif merupakan pihak yang tidak bersalah

dan semua yang telah dilakukannya untuk membuat pembayaran adalah untuk menepati kewajipannya di bawah perjanjian tersebut. Berdasarkan fakta-fakta, tidak boleh dikatakan bahawa tiada bantahan daripada plaintif berkenaan kelewatan yang panjang. Adalah juga ditunjukkan bahawa plaintif tidak gembira untuk berterusan membuat pembayaran tetapi ia telah dipengaruhi untuk berbuat demikian oleh pegawai-pegawai defendan melalui jaminan kepada tarikh penyelesaian yang kemudiannya menjadi janji kosong kerana hartanah tersebut tidak pernah disiapkan pada hujung 2001 atau hujung 2002 (lihat perenggan 17).

(4) Defendan dengan perlanggaran perjanjian tersebut tidak datang ke Mahkamah dengan tangan yang bersih; dan pihak yang tidak datang ke Mahkamah dengan tangan yang bersih tidak boleh meminta pertolongan prinsip-prinsip ekuiti seperti doktrin estopel (lihat perenggan 17).]

Legislation referred to

Contracts Act 1950 s 56(1)

SC Cheah (Lee Hishamuddin) for the plaintiff.
Dato' VK Lingam and Ms VK Lakshmi (VK Lashmi & Co) for the defendant.

Mohd Hishamudin J:

[1] This originating summons is essentially the plaintiffs application for a declaration that the plaintiff be entitled to rescind a sale and purchase agreement dated 24 August 1995 ('the agreement') entered into between the plaintiff as purchaser and the defendant as seller in respect of a property known as parcel No 07-63, Commercial Shop Lot, Berjaya Star City (now known as Berjaya Times Square) held under Grant No 7866, Lot No 339, and Grant No 10798, Lot No. 145, both of which located in Section 52 of Kuala Lumpur ('the property').

[2] I shall begin with a summary of the facts relevant to this action. The plaintiff and the defendant entered into the agreement on 24 August 1995. Pursuant to cl 22(1) of the agreement, the defendant was required to deliver vacant possession of the property to the plaintiff on or before 23 November 1998 ('the stipulated date'). Clause 32 of the agreement provides that time shall be of the essence in relation to all provisions.

[3] In fulfillment of its obligations under cl 3(1) of the agreement, the plaintiff has paid RM1,034,793.90, being 90% of the total purchase price to the defendant, part of which was financed by a loan from AmBank Berhad.

[4] Although the plaintiff has fulfilled its obligations in respect of the payment, the defendant has failed to deliver vacant possession of the property to the plaintiff on or before the stipulated date.

[5] Even on 20 March 2003, that is the date when the plaintiff filed this originating summons, the defendant had still failed to deliver vacant possession of the property.

[6] After the stipulated date, the plaintiffs director, Lee Teen Nguan, had met with the sale and marketing officers of the defendant and despite several assurances given by, among others, Ms Esther/Ms Pey Yee, who promised that the property would be completed by the end of 2001, the defendant still failed to deliver vacant possession of the property to the plaintiff as promised.

[7] Upon the defendant's failure to fulfil its obligations under the agreement, the plaintiffs former solicitors, Messrs Gan & Low, issued a letter dated 27December 2001 to inform the defendant that the plaintiff had decided to rescind the agreement on the ground that the defendant had committed a fundamental breach of its contractual obligation to deliver vacant possession of the property to the plaintiff by the stipulated date pursuant to cl 22(1) of the agreement.

[8] However, the defendant refused to accept the rescission of the agreement by the plaintiff. By a letter dated 3 January 2002, the defendant claimed that as the plaintiff would be entitled to claim for liquidated damages in the event of late delivery of the property, the plaintiff was not entitled to rescind.

[9] Subsequently, the plaintiff sought consent and obtained reassignment of all rights, title and interests from AmBank Berhad to institute legal proceedings against the defendant.

[10] On 1 October 2002, the plaintiff's director, Lee Teen Nguan, met with the defendant's sale and marketing officer, Ms Dianne Chan, and the latter gave her assurance that vacant possession of the property would be delivered by the end of 2002. Despite this assurance, the defendant again failed to deliver vacant possession of the property.

[11] Accordingly, on 5 March 2003 the plaintiff's solicitors sent a letter to demand the defendant to accept the rescission, to refund the monies paid, and to pay all damages suffered by the plaintiff within 14 days. However, the defendant again refused to accept the rescission and to refund the monies paid and to pay all damages suffered by the plaintiff.

[12] The defendant instead sent a letter dated 10 March 2003 to the plaintiffs solicitors to inform that the defendant was not agreeable to the rescission by the plaintiff.

[13] Hence the plaintiff filed the present originating summons to seek a declaration that it is entitled to rescind/terminate the agreement; to seek a refund of the monies paid; and to recover all damages suffered as a result of the defendant's breach of the agreement.

[14] The essential issue which needs to be determined by this Court is whether the failure by the defendant to deliver vacant possession of the property on or before the stipulated date, as provided under cl 22(1) of the agreement, or on or before any other date as promised by the defendant, constitutes a fundamental breach of the contract which entitles the plaintiff to rescind the agreement. In my judgment, considering the unreasonably

long delay to deliver vacant possession, the answer to this question must be in the affirmative. The failure of the defendant to deliver vacant possession of the property after 23 November 1998, as agreed under cl 22(1) of the agreement, for nearly 4 years and 4 months until the present originating summons was filed, amounts to a fundamental breach of the agreement by the defendant. The delay on the part of the defendant is excessive and unreasonable given the fact that the defendant was required to deliver vacant possession of the property to the plaintiff within 36 months from the date of signing of the agreement. As under the agreement time is essential, the failure on the part of the defendant to deliver vacant possession at the stipulated time renders the agreement voidable at the option of the plaintiff (see s 56(1) of the Contracts Act 1950).

[15] The defendant contends that the plaintiff is not entitled to rescind the agreement since there is no provision in the agreement giving the plaintiff the right to terminate the agreement. In the light of s 56(1) of the Contracts Act, there is clearly no merit in this argument.

[16] The defendant next contends that the plaintiff is not entitled to rescind the agreement since the plaintiff is, in any event, entitled to claim liquidated damages. Again, based on s 56(1) there is no merit in this argument.

[17] It is further argued by the defendant that the plaintiff is estopped from rescinding the agreement (or had waived its right to do so) because the plaintiff has paid its installments due under the agreement without protest. This argument too must be rejected. On the facts, it is unjust to estop the plaintiff from rescinding the agreement; the plaintiff is the innocent party and all that it did in making the payments was to honour its obligations under the agreement. And on the facts it cannot be said that there was no protest from the plaintiff over the long delay. It must also be pointed out that the plaintiff was not happy in continuing making the payments but it had been induced in doing so by the defendant's officers through the latter's assurances on the completion date that eventually turned out to be nothing but empty promises as the property was never completed by the either the end of 2001 or the end of 2002. Moreover, the defendant by breaching the agreement has not come to Court with clean hands; and a party who has not come to Court with clean hands cannot pray in aid principles of equity such as the doctrine of estoppel.

Accordingly, the Court granted the declaration prayed for under the originating summons together with the various ancillary reliefs. That is to say, the Court granted the following prayers:

(1) prayer 1 (declaration on plaintiffs right to rescind);

(2) prayer 2(a) – but the amount was varied to RM1,149,771 as the plaintiff has fully settled the purchase price;

(3) prayer 2 (b) (financing costs, legal costs and miscellaneous costs);

(4) prayer 2(c) and (d) – subject to assessment by the Senior Assistant Registrar;

(5) prayers 3 (usual 8% interest under the Rules of the High Court;

(6) prayer 4 (costs of this action).

Order accordingly.

Reported by Mohd Nizam Hamdan